88-373

Supreme Court, U.S.
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No.____

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IN THE
SUPREME COURT OF THE UNITED STATES

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October Term, 1988

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VIRGINIA (GINGER) BOLES,
Petitioner

v.

THE UNITED STATES OF AMERICA,
Respondent

---

# PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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## QUESTIONS PRESENTED

After being victimized by the United States Revenue Service through its paid operatives by the fraudulent appropriation and conversion of her personal artistic property and portfolio and her name, appellant commenced the instant action. The district court ruled her claim is not actionable due to sovereign immunity. Therefore, the questions presented here are:

1. Does 28 USC §2680(c) shield the United States from suit in cases where agents of the United States Internal Revenue Service wilfully and intentionally commit crimes against innocent citizens not the subject of investigation for any breech of the tax laws?

2. Does Section 2680(c) protect the United States from suit if agents of the IRS use the property acquired through their criminal acts in subsequent "sting" operations?

3. Is theft or conversion of personal property of an American citizen not under suspicion or investigation for any breach of the tax laws exempted as grounds for suit under the Federal Tort Claims Act as an act respecting "the assessment or collection of any tax or custom duty" under 28 §2680(c)?

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**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT**

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Petitioner Virginia (Ginger) Boles, respectully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in the matter on May 10, 1988.

## OPINIONS BELOW

On March 31, 1986, the Order of the United States District Court for the Western District of Oklahoma, Honorable Luther B. Eubanks, dismissed petitioner's action and appears in the Appendix at A-1-A-2. The May 10, 1988, Order and Judgment of the United States Court of Appeals for the Tenth Circuit affirming Judge Eubank's Order appears in the Appendix at A-3.

## JURISDICTION

The judgment of the Court of Appeals was entered on May 10, 1988, and this petition was filed within 90 days of that date. The statutory provision which confers jurisdiction on this Court to review the judgment of the Court of Appeals by Writ of Certiorari is 28 USC §1254(1).

## RELEVANT STATUTORY PROVISIONS

Section 2674 of Title 28, U.S. Code, reads as follows:

> The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

Section 2680(c) of Title 28, U.S. Code, reads as follows:

> The provisions of this chapter and section 1346(b) of this title shall not apply to -
>
> (c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any

other law-enforcement officer.

## STATEMENT OF THE CASE

Boles v. United States is a suit under the Federal Tort Claims Act, 28 U.S.C. 1346 (b) and 2671 et seq. Appellant, Mrs. Virginia (Ginger) Boles, is the victim of fraudulent and intentional conversion of her personal property by employees and agents of the United State Internal Revenue Service. (IRS).

The United States Internal Revenue Service, acting by and through its agents and paid informers Maurice Hildebrand and Jim Climer, intentionally and fraudulently converted the personal property of the Appellant. This property consisted of an audio tape recording of religious music sung and performed by the Appellant, and her publicity portfolio consisting of letters recommending her as a singer and performer from many prominent people in Oklahoma. Maurice Hildebrand

offered to try to find someone to act as agent for Mrs. Boles who would assist her in marketing her music. Hildebrand was not the Appellant's agent and had no authority from her to sell or to use her property in any other way than to present it to prospective musical agents. The IRS used the property without Mrs. Boles' knowledge or permission in certain "sting" operations in Texas, in which the music was offered in illegal tax shelter schemes. Had Mrs. Boles known that Hildebrand was an IRS informer and involved in that kind of activity she would not have entrusted him with her music. She would never give anyone permission to use her name and talent in an entrapment operation, or any other secret or clandestine scheme.

Appellant has no idea who might have bought a part of her property and have a defensible claim as a good faith purchaser

for value. The tape is now, therefore, worthless. During the promotion of the illegal tax shelters the IRS agents stated that the Musical tape was worth two million dollars ($2,000,000.00). Mrs. Boles suffered loss of personal and professional reputation and loss of long-time friends and professional acquaintances help and companionship as a result of having her name linked with IRS clandestine operations. She has suffered severe emotional distress because of the injuries inflicted upon her by the IRS.

The United States has made no effort to deny that the injuries claimed by Mrs. Boles were actually inflicted on her by its agents. The IRS, through its agents in Oklahoma City, has apologized to Mrs. Boles for the way she has been treated. Apologies are not enough to repay her for her loss and suffering.

On March 31, 1986, the United States District Court for the Western District of Oklahoma sustained Appellee's motion to dismiss this action on the grounds of lack of subject matter jurisdiction. The Court stated that 28 U.S.C. 2680(c) precluded suit against the United States even under these circumstances. The United States Court of Appeals for the Tenth Circuit affirmed the Order of the District Court.

## REASONS FOR GRANTING THE WRIT

### I. The Decision Below Dismissing This Case For Lack of Subject Matter Jurisdiction Conflicts With the 5th Circuit Decision in Capozzoli v. Tracey.

The United States District Court for the Western District of Oklahoma cited only one case as authority for dismissing this case, Capozzoli v. Tracey, 663 F.2d 654, 658 (5th Cir. 1981). The Court stated in its order dismissing this case, "The language

of [Section] 2680(c) is broad enough to encompass any activities of an IRS agent even remotely related to his or her official duties." Capozzoli is then cited as authority for this statement. At 663 F.2d 658, the very page cited by the Western District of Oklahoma. The Capozzoli Court holds:

> In holding that the Capozzoli claim is one for which the United States has retained its sovereign immunity under 28 U.S.C. [Section] 2680(c) we do not intend to suggest that the government is insulated from tort liability for any and all transgressions committed by IRS employees. Section 2680(c) does not so state . . . . it is conceivable that an IRS agent could engage in tortious conduct sufficiently removed from the agent's official duties of assessing or collecting taxes as to be beyond the scope of Section 2680(c), and at the same time sufficiently within the scope of his employment as to give rise to an action against the United States. Capozzoli at 658.

The Appellant alleges in her Complaint that her artistic property was converted.

It is the conversion of the property by fraud that this suit is based upon. The fact that Hildebrand and Climer used the property, while it was illegally in their possession, in such a way as to accuentuate the injury of loss already inflicted upon Mrs. Boles does not make this any less a suit for conversion of property and the resultant damages. The order upon which this appeal is made further states, "Plaintiff alleges a conversion arising out of an IRS investigation into abusive tax shelters, which is a revenue-raising activity in respect to the assessment or collection of taxes." This is incorrect. The Appellant has never alleged that the conversion arose out of an IRS investigation. Quite the contrary, Mrs. Boles property was used by IRS agents in a "sting" operation after she had been defrauded of it. The conversion and the "sting" operation are two separate acts. Even if the

property had been taken by the IRS agent with his intention to use it in his scheme, the taking or conversion of the Appellant's property happened before its use in any clandestine operation. To claim that the actual taking arose out of or was ever a part of any investigation ignores the elements of time and space. The conversion was effected in Oklahoma where the agents who took the music were not using it in a "sting" operation. The tape and portfolio were taken to Texas and there employed, without the Appellant's knowledge or permission, in a scheme to entrap would-be tax evaders.

Hildebrand and Climer were not involved in the assessment or collection of taxes when they coverted the Appellant's artistic property. To exend the protection against suits given the IRS under Section 2680(c) to criminal acts committed before, and in

another state from, arguably "revenue-raising activity" would amount to"insulating from tort liability for any and all transgressions . . . . . IRS employees. Section 2680(c) does not so state". Capozzoli at 658.

> The very essence of civil liberty certainly consists in the right of every individual to claim the proctection of the laws, whenever he receives an injury. Marbury v. Madison, 1 Cranch 137, 163 (1803)

## II. The Court of Appeals Has Decided an Important Question of Federal Law Which Has Not Been, But Should Be, Settled by This Court.

The United States Internal Revenue Service, acting by and through its undercover agents, converted, or stole, the property and name of Ginger Boles. That they converted her name and property with the intent to use it in their "sting" operation does not make their acts lawful, or any less morally reprehensible, The fact that these men are employees of the United

States Government shames our nation. A government dedicated to the protection and welfare of its citizens does not steal from them.

There can be no doubt that the fraudulent taking of the property of a person not even remotely involved in an IRS investigation constitutes "tortious conduct sufficiently removed from the agent's official duties of assessing or collecting taxes as to be beyond the scope of Section 2680(c)." Had the crime committed been the tortious conversion of an automobile which was later used as transportation for an IRS agent while doing something in the line of collecting taxes, the same questions of law would be present as in this case. The fact that the car thief was an IRS agent and used the car on the job would not excuse the IRS under Section 2680(c). If the agent were acting to further IRS goals the IRS would be liable to the car's owner for

its value and all damages resulting from the theft. The musical property of the Appellant might appear to be less solid and substantial than purely physical personal property. But Appellant's rights in the property that agents of the IRS converted are just as real. Her music is valuable by admission of the agents who took it. It ill serves justice or reason for paid informers for the IRS to be allowed to treat other peoples' property any way they want to, then justify their acts by claiming they were "revenue-raising activity".

> The right of the people to be secure in their person, houses, papers and effects, against unreasonable searches and seizures, shall not be violated . . . Fourth Amendment (IV) to the United Staets Constitution.

Bivens. v. Six Unknown named Federal Narcotics Agents, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed2d 619 (1971), created a damage remedy against federal agents for egregious Fourth Amendment violations. 403

U.S. 384. The 5th Circuit in Rutherford v. United States, 702 F.2d 580 (5th Cir. 1983), followed Bivens in this suit alleging harrassment, intentional embarrassment, and an unconstitutional taking of taxpayer's property through specious assessments. The acts of the IRS agent, Kuntz, were not protected from being the grounds for suit. The Court, in following Bivens' reasoning, found that an action alleging a violation of the Plaintiff's Fifth Amendment right to due process of law was proper. In this case, the IRS agent was clearly involved in acts which constitute "revenue-raising activity." The acts of Maurice Hildebrand and Jim Climer which violated both the Fourth and Fifth Amendment rights of the Appellant are clearly not "revenue-raising activity."

In Cruikshank v. United States, 431 F.Supp. 1355 (D.C. Hawaii 1977), the CIA had opened and photocopied sealed, first-class letters mailed by Cruikshank to

to persons in the Soviet Union. Cruikshank sued the United States alleging invasion of privacy. The Court stated:

> Accepting the allegations of the complaint, we are dealing with the commission of a series of illegal acts by agents of the government. Justice would certanly not countenance a court straining the language of a statute in order to deny the victim of such illegality at least some measure of compensation. Cruikshank at 1361.

Breaking the laws of the United States, or of a State, is clearly outside the discretion allowed government employees by 28 U.S.C. 2680(a). Cruikshank at 1361; Birnbaum vs. United States, 588 F.2d 329 (Ca. NY. 1978). It is wholly illogical to read into the clearly defined exception frawn in 2680 (c) any right of the IRS to commit a crime, an intentional tort, against a citizen of this country with impunity.

One may wonder whether, had the agents of the IRS gained possession of the Plaintiff's property through murder, rather than

through lying and stealing, the Defendant would have put forth the defense that its employees' acts were protected as "revenue-raising activity."

## CONCLUSION

For the foregoing reasons this Court should grant a writ of certiorari to review the issues presented by this Petition.

Respectfully submitted,

Barbara Marie Tracy
Jess Horn
P.O. Box 61034
Oklahoma City, Oklahoma 73146
(405) 232-3438
Attorneys for Petitioner

## CERTIFICATE OF SERVICE

I hereby certify that three copies of this Petition for Writ of Certiorari were served by postage prepaid first-class mail on William S. Price, USA/Mary M. Smith AUSA, counsel for the respondent, and Solicitor General, Department of Justice, on August 6, 1988. I further certify that all parties required to be served have been served.

Barbara Marie Tracy

BARBARA MARIE TRACY
P.O. Box 61034
Oklahoma City, Oklahoma
Attorney for Petitioner
Virgina (Ginger) Boles

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF OKLAHOMA

| | | |
|---|---|---|
| VIRGINA (GINGER) BOLES, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| vs. | ) | CIV-86-008-E |
| | ) | |
| UNITED STATES OF AMERICA, | ) | |
| | ) | |
| Defendant. | ) | |

**ORDER**

This cause came on for hearing on March 27, 1986, on defendant's Motion to Dismiss. The Court having heard the arguments of counsel and examined the briefs, finds as follows:

The United States has not waived its sovereign immunity in regard to claims arising in respect to the assessment or collection of any tax. 28 U.S.C. §2680(c). Plaintiff alleges a conversion arising out of an IRS investigation into abusive tax shelters, which is a revenue-raising

activity in respect to the assessment or collection of eaxes. The language of §2680(c) is broad enough to encompass any activities of an IRS agent even remotely related to his or her official duties. Capozzoli v. Tracey, 663 F.2d 654, 658 (5th Cir. 1981).

Therefore, plaintiff's claims are not actionable under the Federal Tort Claims Act, 28 U.S.C. §1346(b) and 2671 et seq. This Court lacks subject matter jurisdiction and plaintiff has failed to state a claim upon which relief may be granted.

Defendant's Motion to Dismiss therefor should be and hereby is, granted. This action is DISMISSED.

IT IS SO ORDERED this ___ day of March, 1986.

/s/ Luther B Eubanks

LUTHER B. EUBANKS
United States District Judge

Entered in Judgment
Docket on 3-31-86

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

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| | | |
|---|---|---|
| VIRGINA (GINGER) BOLES, | ) | |
| | ) | |
| Plaintiff-Appellant, | ) | No. 86-1729 |
| | ) | (D.C. No. |
| vs. | ) | CIV-86-008-E) |
| | ) | (W.D. Okla.) |
| UNITED STATES OF AMERICA, | ) | |
| | ) | |
| Defendant-Appellee. | ) | |

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ORDER AND JUDGMENT

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Before McKAY, SEYMOUR, and TACHA, Circuit Judges.

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The order of the district court is affirmed. The district court correctly dismissed for lack of subject matter jurisdiction. The United States has not waived its sovereign immunity in regard to claims arising in respect to the assessment or the collection of any tax. 28 U.S.C. §2680(c).

**AFFIRMED.**

ENTERED FOR THE COURT

Deanell Reece Tacha
Circuit Judge

Supreme Court, U.S.
FILED
OCT 26 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-373

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OCTOBER TERM, 1988

VIRGINIA (GINGER) BOLES, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT*

## MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
*Solicitor General*
*Department of Justice*
*Washington, D.C. 20530*
*(202) 633-2217*

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UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT*

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## MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends that the courts below erred in dismissing her complaint as barred by the exception to the Federal Tort Claims Act (FTCA) (28 U.S.C. 1346(b) and 2671 *et seq.*) that preserves the United States' sovereign immunity against "[a]ny claim arising in respect of the assessment or collection of any tax or customs duty * * *" (28 U.S.C. 2680(c)).

1. Petitioner's lawsuit stems from the actions of Maurice Hildebrand, an undercover operative for the Internal Revenue Service (IRS). Petitioner alleges that Hildebrand wrongfully converted musical recordings of her gospel singing for use in an IRS "sting" operation. According to petitioner, Hilde-

brand obtained the musical tapes from her by offering to seek a commercial market for her singing talents. The IRS investigative team, including James Climer, used these tapes as bait for persons suspected of participating in illegal tax shelters. Targets of the IRS investigation were afforded the opportunity to invest in musical recordings, including those made by petitioner. Hildebrand also mailed to the investigative targets copies of petitioner's portfolio that included recommendation letters supporting petitioner from several prominent people in Oklahoma. IRS officials have since apologized to petitioner. Pet. 4-6.

Petitioner filed an administrative tort claim, contending that the IRS's use of her name and her music constituted an unlawful conversion of her property. On January 2, 1986, after her administrative claim was denied, petitioner filed this lawsuit under the FTCA seeking $8,000,000 in damages for loss of her musical property, injury to her personal and professional reputation, and emotional harm.

2. After a hearing on March 27, 1986, the district court dismissed (Pet. App. A1-A2) petitioner's action, ruling that it was barred by the exception to the FTCA that preserves the United States' sovereign immunity against "[a]ny claim arising in respect of the assessment or collection of any tax or customs duty * * *" (28 U.S.C. 2680(c)). The court found (Pet. App. A1) that the investigation into abusive tax shelters was "a revenue-raising activity in respect to the assessment or collection of taxes." It then held (*ibid.*, citing *Capozzoli* v. *Tracey*, 663 F.2d 654, 658 (5th Cir. 1981)) the language of Section 2680(c) to be sufficiently broad "to encompass any activities of an IRS agent even remotely related to his or her official duties." Accordingly, the court

concluded (Pet. App. A2) that petitioner's claim based on activities related to the IRS investigation was not actionable under the FTCA. It denied (Docketing Statement (10th Cir.), Exh. A) petitioner's motion to vacate the dismissal. The court of appeals affirmed (Pet. App. A3) in a three-sentence opinion, concluding that the district court correctly dismissed petitioner's action for lack of subject matter jurisdiction. The court stated (*ibid.*) simply that "[t]he United States has not waived its sovereign immunity in regard to claims arising in respect to the assessment or the collection of any tax."

3. The decision of the court of appeals is correct and does not conflict with any decision of any other court of appeals. The United States may only be held liable for torts committed by its employees when it has clearly relinquished its sovereign immunity by statute. *Kosak* v. *United States*, 465 U.S. 848, 851 (1984) (citing *Dalehite* v. *United States*, 346 U.S. 15, 31 (1953)). As both the district court (Pet. App. A1) and the court of appeals (*id.* at A3) noted, a statutory exception to the FTCA expressly *preserves* the sovereign immunity of the United States from "[a]ny claim arising in respect of the assessment or collection of any tax or customs duty" (28 U.S.C. 2680(c)). Moreover, this Court has stressed (*Kosak*, 465 U.S. at 854) that the language of Section 2680 (c) is to be read expansively to bar any claims "arising out of" the specified activity. Although *Kosak* concerned Section 2680(c)'s parallel provision concerning "the detention of any goods or merchandise by any officer of customs," the Court's analysis (*id.* at 853-855) of the statute's plain meaning applies equally to bar any claims arising "out of" tax collecting activities. See, *e.g.*, *Murray* v. *United States*, 686

F.2d 1320, 1324 (8th Cir. 1982) (no FTCA suit for wrongful denial of mortgagee's redemption rights by IRS), cert. denied, 459 U.S. 1147 (1983); *Morris* v. *United States*, 521 F.2d 872 (9th Cir. 1975) (no FTCA suit for harassment, intimidation, damage to taxpayer's business caused by agent); *United States* v. *Worley*, 213 F.2d 509 (6th Cir. 1954) (no FTCA suit for wrongful conversion of property by IRS), cert. denied, 348 U.S. 918 (1955); *Broadway Open Air Theatre* v. *United States*, 208 F.2d 257 (4th Cir. 1953) (same). Here petitioner's harm clearly resulted from Hildebrand's and Climer's efforts to assess and collect taxes from the targets of the IRS investigations. Accordingly, no action against the United States is available to redress petitioner's alleged injuries.[1]

Petitioner seeks to escape the statutory bar to her lawsuit by asserting (Pet. 9-11) that the IRS agents' conversion of her musical recordings was somehow separate from the IRS's efforts to assess or collect taxes. Petitioner contends (*id.* at 10) that to find a link between the taking of her tapes and the IRS "sting" operation would be to ignore "the elements of time and space." The statute, however, requires

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[1] Petitioner's reference to *Rutherford* v. *United States*, 702 F.2d 580 (5th Cir. 1983), is not apposite. *Rutherford* concerned an action under *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971), against an IRS agent, not a tort claim under the FTCA against the United States. Petitioner also cites *Birnbaum* v. *United States*, 588 F.2d 319 (2d Cir. 1978), and *Cruikshank* v. *United States*, 431 F. Supp. 1355 (D. Haw. 1977), for their discussion concerning the scope of authority limiting the discretionary function exception to the FTCA (28 U.S.C. 2680(a)); that discussion is not relevant in construing Section 2680(c)'s clear reference to tax collecting and assessing activities.

no precise spatial or temporal link between the challenged IRS conduct and the IRS's tax collecting activities. Insofar as petitioner is correct that IRS employees "converted her name and property with the intent to use it in their 'sting' operation" (Pet. 11), the relation of the conversion and the tax collecting effort is evident. The situation is no different from that where an IRS agent mistakenly seizes funds and brings them home before depositing them with the Treasury; the fact that the money traveled a circuitous route would hardly create federal liability for the wrongful seizure. Petitioner does not cite any authority to the contrary.

Nor can petitioner support her claim that the sovereign immunity of the United States is somehow removed because of the fact that she herself was never a target of the IRS investigation. The plain language of Section 2680(c) bars "[*a*]*ny* claim arising in respect of" tax collection. 28 U.S.C. 2680(c) (emphasis added). Accordingly, federal courts have uniformly held Section 2680(c) applicable to third-party claims. *Interfirst Bank Dallas, N.A.* v. *United States*, 769 F.2d 299, 307-308 (5th Cir. 1985), cert. denied, 475 U.S. 1081 (1986); *Murray*, 686 F.2d at 1324; *Worley*, 213 F.2d at 512; *Broadway Open Air Theatre*, 208 F.2d at 258. These decisions correctly adhere to this Court's settled principle (*Dalehite*, 346 U.S. at 30) that "no action lies against the United States unless the legislature has authorized it." Moreover, a decision to exempt third parties from Section 2680(c) would contravene the statute's obvious purpose of aiding tax collection because it would impair the IRS's ability to recover taxes from persons whose property was in the possession of others or otherwise encumbered. See, *e.g.*, *Interfirst Bank*, 769 F.2d at

308 (IRS tax collection effort immune from suit by bank holding security interest in taxpayer's accounts receivable); *Murray*, 686 F.2d at 1324 (similar, where suit by individual claiming to be mortgagee of taxpayer). In fact, 26 U.S.C. (& Supp. IV) 7326's protection for victims of wrongful levies would be rendered wholly superfluous (*Interfirst Bank*, 769 F.2d at 398 n.14) if suits under the FTCA were already available to third parties whose property was wrongfully seized. Accordingly, a bar on suits by third parties whose property is taken in connection with IRS tax collection efforts is safely "within the words and reason of [Section 2680(c)'s] exception" to the FTCA. See *Kosak*, 465 U.S. at 853-854 n.9 (quoting *Dalehite*, 346 U.S. at 31).

Finally, petitioner contends (Pet. 7-11) that the court of appeals' decision conflicts with the Fifth Circuit's decision in *Capozzoli* v. *Tracey*, 663 F.2d 654 (1981). In fact, the court of appeals' decision is a straightforward application of the framework *Capozzoli* established. In *Capozzoli*, the Fifth Circuit found the United States *immune* from a suit based on accusations that an IRS agent had invaded plaintiffs' privacy when he mistakenly photographed their home during the course of investigating a casualty loss deduction applicable only to plaintiffs' adjacent, undeveloped tract of land. The court concluded (663 F.2d at 657-658) that Section 2680(c) would bar the suit even if the IRS agent had no authority to take the allegedly invasive photographs. Only "[w]here an IRS employee commits a tort wholly unrelated to his or her official duties of assessing or collecting taxes" (663 F.2d at 658), would the sovereign immunity retained under Section 2680(c) not apply. In this case, Hildebrand's actions were arguably even

more closely related to his official duties than were the actions of the *Capozzoli* agent. Hildebrand allegedly took petitioner's musical tape and used it in a tax "sting" operation; the *Capozzoli* agent mistakenly took photographs that had no use to the IRS. The courts below thus stayed well within *Capozzoli*'s holding that Section 2680(c) bars any FTCA suit that is based on "any activities of an IRS agent even remotely related to his or her official duties" (663 F.2d at 658).[2]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
*Solicitor General*

OCTOBER 1988

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[2] The dicta in *Capozzoli* acknowledging the theoretical possibility that an agent could commit a tort that would be sufficiently unrelated to his official duties for purposes of Section 2680(c) but still within the scope of his employment for the purpose of establishing the government's vicarious liability is irrelevant to this case. The courts below did not deny that theoretical possibility; they simply did not find it present on the facts of this case.

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